

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

REC-18 1996

In The Matter of the
Application of

HERBERT L. SCHOENBOHM
Kingshill, Virgin Islands

For Amateur Station
and Operator Licenses

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WT Docket No. 95-11

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To: The Review Board

WIRELESS TELECOMMUNICATIONS BUREAU'S
REPLY TO EXCEPTIONS

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Summary

The Bureau submits that the Initial Decision in this proceeding accurately reflects an thorough and equitable analysis of the facts and law. Accordingly, the Initial Decision should be affirmed.

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Preliminary Statement

1. The Chief, Wireless Telecommunications Bureau, by her attorneys and pursuant to § 1.277(c) of the Commission's rules, hereby submits her reply to the Exceptions of Herbert L. Schoenbohm ("Schoenbohm") to the Initial Decision of Administrative Law Judge Edward Luton, FCC 96D-01 (released February 2, 1996) ("ID"). The Bureau's failure to reply to any particular exception or argument should not be construed as a concession on the Bureau's part as to the accuracy or completeness of those exceptions or arguments.¹

Argument

Claimed Omissions

2. In Paragraphs III-1 through 5 of his Exceptions, Schoenbohm claims that the ALJ erroneously omitted, from the ID a portion, of 47 U.S.C. § 1029(e)(1) and the entirety of 47 U.S.C. § 1029(a)(3), (4), and (5) and (e)(6). The omission of 47 U.S.C. § 1029(a)(3), (4), and (5) and (e)(6) from the ID was not error because these subsections concern crimes of which Schoenbohm was not convicted and, therefore, have no relevance. The omission of language from 47 U.S.C. § 1029(e)(1) was harmless error. The

¹ Schoenbohm's Exceptions were erroneously directed to the Commission, rather than the Review Board. The Review Board extended the deadline for the Bureau to file its instant Reply to March 18, 1996.

words "... electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier ... " were omitted from the definition of "counterfeit access device."² As shown in Paragraph 12, below, the absence of these words could not have affected the ALJ's decision.

Claimed Conflict

3. In Paragraphs III-6 through 8 of his Exceptions, Schoenbohm claims that the ALJ erroneously found a conflict between Schoenbohm's written testimony about his employment and his testimony at the hearing (Exceptions, p.7). In Paragraph 12 of the ID, the ALJ summarized Schoenbohm's testimony concerning his employment but he did not find any conflict.

Claimed Variance With Precedent

4. In Paragraphs III-10 through 26 of his Exceptions, Schoenbohm argues that the denial of his application is at variance with precedent. In fact, the opposite is true.

²Section 1029(e)(1) defines an "access device" as "any plate, card, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of access that can be used, alone or in conjunction with another access device, to obtain money, goods, services or any other thing of value or that can be used to initiate a transfer of funds (other than transfer initiated solely by paper instrument)."

5. Schoenbohm was convicted of violating U.S.C. § 1029(a)(1) (fraudulent use of counterfeit access device)². See Government v. Schoenbohm, No. Crim: 1991/0108 (D.V.I. Dec. 30, 1992); aff'd, United States V. Schoenbohm, No. 93-7516 (Third Circuit July 22, 1994), rehearing denied, United States V. Schoenbohm, No. 93-7516 (Third Circuit November 2, 1994). Schoenbohm's principal argument for reversing the ID is that denying Schoenbohm's amateur license application partially on the basis of this conviction is unfair because, in other cases, the Commission granted licenses to persons whose crimes were less serious than Schoenbohm's. Schoenbohm cites a case involving a second degree murder conviction, Alessandro Broadcasting Co., 99 FCC 2d 1, 56 RR 2d 1568 (Rev. Bd. 1984); and In Re Application of Richards, 1995 WL 170663, a case involving a conviction for the possession of marijuana with intent to distribute (not actual distribution, as Schoenbohm claimed in Paragraph 24 of his Exceptions).

6. Schoenbohm's argument is very simplistic. The Commission has never held that the effect of a criminal conviction upon an applicant's qualifications depends solely or even primarily upon the seriousness of the crime. The

²Section 1029 provides, in pertinent part, that whoever "knowingly and with intent to defraud uses one or more counterfeit access devices . . . shall, if the offense affects interstate or foreign commerce, be punished as provided"

seriousness of a crime is one of several factors used in determining mitigation. See Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1225-1229 (1986) and Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 3252, 3252 (1990). The effect of a criminal conviction upon an applicant's qualifications is measured not simply by the seriousness of the crime but by "the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and [Commission] rules and policies." Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 1179, 1183 (1986). The crimes in Richards and Alessandro, supra, may have been more "serious" but Schoenbohm's crime - especially when viewed with in conjunction with his untruthful testimony in this case and his flouting of the ex parte rules - has a greater effect on the applicant's qualifications.

Public Service

7. In Paragraph III-20 of his Exceptions, Schoenbohm implies that the ALJ should have given more weight to Schoenbohm's public service record. Public service is not one of the Commission's specified mitigation factors. Although commendable, Schoenbohm's public service activities can have no mitigating effect. The Commission held in David B. Hodges, 4 FCC Rcd 8692, 8692 (1989), that an amateur's public service

contributions, even if substantial, do not mitigate violations that warrant enforcement sanctions. Even without this holding, it would be evident, for the following reasons, that little or no mitigating effect should be given to Schoenbohm's public service activities:

(a) There is no information in the record as to any accomplishments by Schoenbohm as Chairman of the State Emergency Communications Committee for the Virgin Islands, except for his unsupported claim to have received a "planning award" (Bureau's Findings of Fact, Paragraph 11).

(b) Schoenbohm's assisting in the apprehension of hijacker during 1987 (Bureau's Findings of Fact, Paragraphs 10 and 11) apparently is something that he did in connection with his job.

(c) As for Schoenbohm's provision of emergency communications to Thor Heyerdahl in 1969 and during hurricanes in 1979, 1989, and 1992 (Bureau Findings of Fact, Paragraph 10), it is not surprising that an active amateur who resides in an area prone to tropical storms would provide emergency communications on a number of occasions over a period of 23 years. While this activity is certainly commendable, it is not unusual.

Currentness

8. In Paragraph III-23 of his Exceptions, Schoenbohm claims that the grant of the application in Alessandro, supra, requires the same result because, in both cases, the events leading to the criminal conviction were "remote in time" and the person convicted had paid his debt to society. This is incorrect. The Commission, in a renewal case, may consider any conduct occurring within the current license term. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1229

(1986). Furthermore Alessandro, supra, does not support Schoenbohm's argument. In that case the conviction under consideration occurred in 1971 -- 13 years before the decision -- compared with three years in this case. (The decision in Alessandro, supra, does not indicate the date of the events that were the basis of the conviction.)

Harm To Others

9. In Paragraph III-24 of his Exceptions, Schoenbohm claims that the conduct leading to his conviction did not actually harm anyone. This is not correct. Schoenbohm's theft of long distance telephone service caused a financial loss to the carrier, which would have received revenue if Schoenbohm had paid for his calls. This contrasts with Richards, supra, where no one except Richards suffered a financial loss.

Rehabilitation

10. In Paragraph 25 of his Exceptions, Schoenbohm claims that he's been rehabilitated. Schoenbohm presented no convincing evidence of his rehabilitation. The Commission has specified four factors to be considered in determining whether an applicant has been rehabilitated. See Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 3252, 3254 n.4 (1990).

(a) The first specified factor is whether the applicant has been involved in any significant wrongdoing since the misconduct occurred. By violating the Commission's ex parte rules (See Paragraphs 15-17, below), Schoenbohm has indeed been involved in significant wrongdoing. Furthermore, even if there had not been significant wrongdoing, there has been insufficient time since the end of Schoenbohm's probation for him to demonstrate rehabilitation through the avoidance of wrongdoing [Schoenbohm, who was sentenced to two months of house confinement and two years of probation, started serving his sentence on January 11, 1993 (Bureau Findings of Fact, Paragraph 4)].

(b) The second factor is how much time has elapsed since the misconduct. Schoenbohm's misconduct occurred during the current license term and, therefore, can be considered. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1229 (1986).

(c) The third factor is the applicant's reputation for good character in the community. Although he is well known in his community (Bureau Findings of Fact, Paragraph 14), Schoenbohm did not produce a single witness who testified about his reputation for good character (Bureau Findings of Fact, Paragraph 13). By contrast, Richard Richards produced 26 character witnesses. In Re Application of Richards, supra at para. 8.

(d) The fourth factor is whether meaningful measures were taken by the applicant to prevent future occurrence of the misconduct. Schoenbohm took no such measures. Richard Richards, by contrast, took significant steps to remedy his misconduct. In Re Application of Richards, supra at paras. 6, 7, 34. Schoenbohm has even not expressed remorse for his crime (Bureau Findings of Fact, Paragraph 6) -- the first step in remedying misconduct. Schoenbohm's claim that he cannot express remorse for his crime because it would jeopardize his appeal (Bureau Findings of Fact, Paragraph 6) is specious. The record contains no documentary proof that Schoenbohm has an appeal pending. The U.S. Court of Appeals for the Third Circuit affirmed Schoenbohm's conviction and denied his petition for a rehearing. The District Court then denied his motion for a new trial.

(e) Although employment is not one of the Commission's specified rehabilitation factors, the only evidence that Schoenbohm produced to prove rehabilitation is his employment as Director of Transportation by the Virgin Islands Government and as a (part time) District Field

Representative by Congressional Delegate Victor O. Frazer (Bureau Findings of Fact, Paragraph 9). For a person who has not been regularly employed and has been supported by criminal activities, obtaining employment is a significant step toward rehabilitation. In Schoenbohm's case, however, the record shows that, rather than being supported by criminal activities, he has been regularly employed (Bureau Findings of Fact, Paragraphs 9 and 13). Furthermore, Schoenbohm's employment cannot be used to infer that he has a reputation for good character. Both appointments were political (Bureau Findings of Fact, Paragraph 9) and, therefore, were not necessarily based on merit. The role, if any, of Schoenbohm's character in his selection is unknown. If Schoenbohm's employers had any first-hand knowledge of his reputation in the community for good character, then the best evidence of this reputation would be their testimony -- but Schoenbohm did not offer such testimony. Schoenbohm's employment is of minimal significance at best in determining whether he has been rehabilitated.

The foregoing analysis indicates that Schoenbohm has not been rehabilitated. The proffered evidence of his rehabilitation is very minimal at best; on the other hand, Schoenbohm's willingness to flout the Commission's ex parte rules convincingly demonstrates that he has not been rehabilitated.

Candor and Truthfulness

11. In Paragraph III-27 of his Exceptions, Schoenbohm attacks the ALJ's conclusion that Schoenbohm's testimony about the facts of his conviction was deliberately false (ID, para. 21). The ALJ (ID, para. 20) found that, in his first testimony about his conviction, Schoenbohm was straight forward but, in later written testimony and in his oral testimony at the hearing, he altered his first testimony to cast the conviction in a

different light. The ALJ (ID, para. 21) found further that the alteration was a conscious effort to influence and mislead the trier of fact.

12. Schoenbohm claims that the ALJ did not understand the purpose of Schoenbohm's testimony. He argues that "The purpose of counsel's questions to Schoenbohm at the hearing [about Schoenbohm's conviction], which Schoenbohm answered truthfully, was to establish truthfully that Schoenbohm did not produce or possess any counterfeit credit cards, plates, or other electronic apparatus ... useful to make calls without paying for them. If the ALJ had correctly taken into account these other provisions of Section 1029 [18 U.S.C. § 1029 (a)(3)-(6) and the words omitted from 18 U.S.C. § 1029(e)(1)], he would have understood the distinction that counsel and Schoenbohm were trying to make." This reasoning is faulty because:

(a) Schoenbohm was not convicted of violating 18 U.S.C. § 1029 (a)(3)-(6), so there was no reason to consider those subsections; and even, without the language omitted from 18 U.S.C. § 1029(e)(1), it is clear that the definition of an access device includes both tangible (such as a card, plate or mechanical device) and intangible (such as a memorized number) access devices - which appears to be the distinction that Schoenbohm claims he was trying to make. The ALJ, therefore, was not misled by failing to take any part of the statute into account.

(b) The distinction Schoenbohm claims he was trying to make -- apparently between tangible and intangible access devices -- would be illogical because the use of either kind of counterfeit access device has the same effect -- defrauding the carrier -- and would be equally blameworthy.

(c) If Schoenbohm's testimony about his conviction actually had the claimed purpose, this argument ought to have been raised below so that the ALJ could have considered it. See Mount Hood Radio and Television Broadcasting Corporation, 59 FCC 2d 1198 (1976). The Bureau argued in its Proposed Findings of Fact and Conclusions of Law that Schoenbohm mischaracterized his conviction in his testimony by claiming that he was convicted of possession of a counterfeit access device (Bureau's Conclusions of Law, Paragraph 25). Schoenbohm, therefore, had the opportunity to make the same argument below, but he did not do so.

(d) Even if Schoenbohm's testimony about his conviction did have the claimed purpose, this still would not exclude the possibility that it also was intended to mislead the ALJ. In any event, Schoenbohm's testimony speaks for itself. He testified at the hearing that he was convicted of the crime of possessing a counterfeit access device [He responded "That's Correct," to his counsel's question, "Now you have been convicted, have you not, of the crime of possessing a counterfeit telephone access device?"] (Tr. 38). Since Schoenbohm was actually convicted of, under 18 U.S.C. § 1029 (a)(1), of using a counterfeit access device and not of possession, his testimony that he was convicted of possession was demonstrably untruthful. The ALJ, who had the advantage of being able to observe Schoenbohm's demeanor at the hearing, properly concluded that Schoenbohm was not truthful.

13. There is ample evidence of Schoenbohm's untruthfulness even without considering Schoenbohm's testimony about his conviction. Schoenbohm also testified incredibly about his solicitation of an ex parte presentation (Bureau Findings of Fact and Conclusions of Law , Paragraphs 16 and 25); and about his pension rights (Bureau Findings of Fact and Conclusions of Law , Paragraphs 7, 8, and 25). As to Schoenbohm's pension rights, it is not reasonable to believe that anyone in Schoenbohm's position would have so little knowledge about his pension rights, particularly when he is claiming to have lost pension rights

worth \$150,000. Additionally, Schoenbohm gave inconsistent testimony (Bureau Findings of Fact and Conclusions of Law , Paragraphs 8, 9, 16, and 25).

14. Schoenbohm's conviction for a felony involving fraudulent conduct reflects on his propensity for truthfulness. See Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 1179, 1196-97 (1986). Therefore, even if Schoenbohm's untruthful testimony is disregarded, he still must sustain the burden of proving that -- despite his conviction -- he can be relied upon to deal with the Commission truthfully. Schoenbohm has not presented any substantial evidence to establish his truthfulness. As indicated above, Schoenbohm is so well known in his community that, if he has a reputation in the community for truthfulness and honesty, there should be many people who could testify about that reputation. Nevertheless, Schoenbohm failed to produce a single witness who testified that he had a reputation in his community for truthfulness and honesty. By contrast, in In Re Application of Richards, *supra*, on which Schoenbohm is relying, the applicant, Richard Richards, produced no fewer than 26 such witnesses. Id. at para. 8.

Ex Parte Violation

15. In Paragraphs III-28 through 33 of his Exceptions, Schoenbohm attacks the ALJ's conclusion that Schoenbohm solicited

an ex parte presentation, in violation Section 1.1210 of the Commission's Rules, 47 C.F.R. § 1.1210. In particular, Schoenbohm claims that the ALJ erred by concluding that Schoenbohm's claim that his remarks were nothing more than "an exposition of [his] newly acquired knowledge" of the ex parte rules is not supported by the evidence (ID, Paragraph 25). Schoenbohm's claim is not supported by the evidence because the plain meaning Schoenbohm's own contradicts that claim: Schoenbohm stated that he is not permitted to make any requests for "political intervention" in this matter but other people can do so. He then provided the name, address and telephone number of congressional Delegate Victor Frazer. Schoenbohm went on to make specific suggestions about the content of letters written to congressmen in his behalf -- such as providing information concerning Schoenbohm's participation in emergency communications and asking the congressmen whether the nonrenewal of Schoenbohm's amateur licenses would have any negative impact on their constituents (Bureau Findings of Fact, Paragraph 15). Finally, the clear implication of Schoenbohm's claim to have been instrumental in Delegate Frazer's election (Bureau Findings of Fact, Paragraphs 14,15) is that Delegate Frazer is indebted to him and, therefore, would be inclined to assist him.

16. In Paragraph III-31 of his Exceptions, Schoenbohm claims that the ALJ ignored the parties' stipulation that the Commission did not receive any letters or other presentations

from elected officials on Schoenbohm's behalf (Tr. 34). The apparent failure of Schoenbohm's efforts to actually generate any ex parte presentations is entirely fortuitous and does not mitigate his violation merely because the solicitation was unsuccessful. Schoenbohm's solicitation over an amateur radio frequency, on which it could have been heard by many amateurs, had the intended potential to generate multiple ex parte presentations.

17. In Paragraph III-33 of his Exceptions, Schoenbohm claims that any violation by him of the anti-solicitation rule was "innocent" or "unknowing." This is simply not true. Schoenbohm's violation of the ex parte rules on April 3, 1995, was not innocent or unknowing. Schoenbohm admitted that, initially, he did send letters to elected officials. Subsequently, during March 1995, Schoenbohm retained an attorney who explained the ex parte rules to him (Bureau Findings of Fact, Paragraph 16). Therefore, on April 3, 1995, Schoenbohm knew about the Commission's ex parte rules and that his earlier solicitations had violated those rules. Furthermore, the plain meaning of Schoenbohm's words on April 3, 1995, shows that he intended to solicit others to make ex parte presentations (Bureau Conclusions of Law, Paragraph 19).

Oral Argument

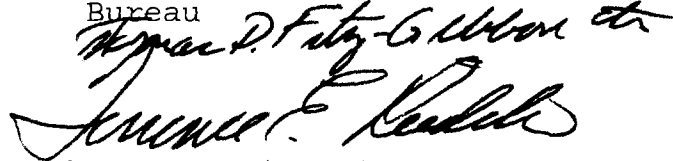
18. In Paragraph IV-5 of his Exceptions, Schoenbohm requests oral argument. The Bureau opposes scheduling an oral argument. Schoenbohm has not specified any circumstances which would warrant an oral argument. Oral argument is unnecessary and should not be scheduled.

Conclusion

19. Schoenbohm was found guilty of a felony involving fraudulent conduct in a communications service regulated by the Commission. That conviction evinces a likelihood that, if Schoenbohm's application is granted, the Commission will not be able rely on him to be truthful or to comply with the Communications Act and Commission's Rules and policies. He has not sustained his burden of proving otherwise. Additionally, Schoenbohm flouted the Commission's ex parte rules; this is the final "nail in the coffin" showing that he can't be relied on. It is evident that Mr. Schoenbohm does not possess the requisite qualifications for a renewal of his amateur station and operator

licenses. The ID, therefore, should be affirmed.

Respectfully Submitted,
Michele C. Farquhar
Chief, Wireless Telecommunications
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Handwritten signatures of Thomas D. Fitz-Gibbon and Terrence E. Reideler in black ink.

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March 18, 1996

Certificate of Service

I, Rosalind Bailey, a secretary in the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on March 18, 1996, sent by regular United States mail, copies of the foregoing " Wireless Telecommunications bureau's Reply to Exceptions" to:

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